United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6125

To be argued by
MICHAEL H. DOLINGER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6125

JOSEPH P. ORNATO,
Plaintiff-Appellant,

—v.—

MARTIN HOFFMAN, Secretary of the Army, and COMMANDING OFFICER, RESERVE COMPONENTS PERSONNEL,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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Statement of the Case

This is an appeal by Dr. Joseph P. Ornato from an order of the United States District Court for the Southern District of New York, Gerard L. Goettel, denying his motion for a preliminary injunction to prevent his call-up for two years of active duty pursuant to his obligation as an officer in the United States Army, Reserves.

Dr. Ornato ("plaintiff"), a Captain in the Reserves, brought this action on August 4, 1976 seeking, *inter alia*, preliminary and permanent injunctive relief following the Army's denial of his application for an exemption from active service on a claim of community hardship. Although

he was scheduled to report for duty on August 5, defendants consented to a temporary restraining order delaying his reporting date to August 16, 1976 to enable the District Court to rule on his motion for preliminary relief.

On August 13, 1976, the District Court denied plaintiff's motion for an injunction *pendente lite*, holding that the Army had complied with its regulations and that the Cour lacked authority to examine the merits of the Army's decision. (A. 2). The Court did continue the temporary restraining order pending appeal, conditioned upon the filing of an expedited appeal.

The jurisdiction of this Court is founded upon 28 U.S.C. § 1292(a)(1).

Statement of Facts

Plaintiff's Participation in the Berry Plan

Plaintiff was commissioned as a first lieutenant in the United States Army, Reserve, in November 1971, after graduating from medical school. (A. 102). At the time he applied for, and was subsequently granted, a four-year deferment of his active duty obligation to permit him to complete his post-graduate medical training. (A. 96-97). In his application for appointment, plaintiff acknowledged:

> "I will enter on active duty for a period of 2 consecutive years upon expiration of the period of delay from order to active duty to complete residency or other post doctoral training. . ." (A. 105).

The specific period of delay authorized for him was to end on June 30, 1976, upon his completion of a two-year residency in internal medicine and a two-year residency in cardiology. (A. 96).

Plaintiff's deferment was granted under the Armed Forces Physicians Appointment and Residency Program, known as the Berry Plan. This plan, which is implemented within the Department of the Army by Army Regulation 135-50, is a voluntary program which permits a physician to defer his active military service commitment until after completion of his residency training in his specialty. Following completion of his residency, the officer is obligated to serve for two years on active duty. In this way, the participant's educational process is not interrupted and he subsequently serves in his specialty rather than as a general medical officer.

Plaintiff formally requested deferment through June 30, 1976 (A. 97) and the Army approved his application. (A. 96). Pursuant to AR 135-50, however, plaintiff was required to and did make separate requests for permission to continue his deferment for each of his three subsequent years of study. Those applications, which were made on January 30, 1973, February 7, 1974, and January 27, 1975 respectively, were all routinely granted (A. 85-90, 92-94); and in each case plaintiff signed an Agreement for Continuation of Berry Plan Deferment—For Residency Training (AR 135-50), which states in part:

> "I hereby agree and consent that, if I am appointed a Reserve officer in the Medical, Dental, or Veterinary Corps (as applicable) and subject to further orders of the Secretary of the Army, I shall serve on active duty for a period of 2 consecutive years upon expiration of the period of delay in being ordered to active duty to complete residency or other post doctoral training. After completing the active duty obligation, I further agree and consent to remain a member of the Army Reserve until such time as I have fulfilled my military obligation or the contractual agreement, whichever is the later date." (A. 87, 90, 94).

Plaintiff's Exemption Application

On February 9, 1976, some five months before he was scheduled to go on active duty, plaintiff requested an exemption from his obligatory two-year tour of active duty. The stated bases for his request were that he had become the director of a paramedic program at New York Hospital, that no one could be found to replace him in that capacity, and that consequently his departure for two years would constitute a community hardship. (A. 17-21). Such requests for delay or exemption from active duty by Berry Plan participants are governed by the provisions of Army Regulation 601-25.* The specific criteria for establishing community hardship are set forth in paragraph 2-19 of AR 601-25 **:

> "A USAR MC or DC officer may request a Category C delay based on alleged essentiality or community hardship. . . . Delay will be granted only when all of the following conditions are met:
>
> (1) The medical/dental service being performed is essential to the maintenance of health, safety, or welfare in the officer's community.
>
> (2) The service cannot be performed by other physicians/dentists residing in the area.
>
> (3) Prior to the date scheduled to report for active duty the officer cannot be replaced in the community by another person who can perform the medical/dental service."

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* The Community Essentiality Program was mandated by Department of Defense Instruction 1205.1, which directs the military departments to create a board to consider requests for delay or exemption from active duty based upon community hardship.

** Although the introductory language refers only to requests for delay, the Army has treated the regulation as permitting exemptions as well. *See* AR 601-25, ¶ 2-20.

(4) There is reasonable assurance that the officer can be replaced in the community within the authorized period of delay.

To seek an exemption, the officer or his employer must submit a written application which includes, as required documentation, "a statement from the State Professional Association showing the number of personnel in the area with similar qualifications, or who are planning the same or similar service," "letters from at least 5 disinterested persons indicating how the officer's withdrawal from the community would affect its health, safety, or welfare and the actions taken to obtain a replacement," and, in the case of delay requests, an indication of "the expected date within the authorized 6 months delay period that a replacement will be available to alleviate the hardship condition." AR 601-25, ¶ 2-20.

Applications for exemption are considered by the Army's Delay and Exemption Board. AR 601-25, ¶ 2-22.* The Board is required to recommend approval or disapproval of the request, but it may recommend delay in lieu of exemption if in its opinion a disapproved request for exemption warrants delay. Proceedings before the Board are not adversarial in nature and do not include personal appearance, witnesses, or rules of evidence.

If the Board's decision is adverse to the officer, he is notified of the reasons for the denial and may appeal directly to the Adjutant General, who will make the final decision.

In this case, plaintiff's February 1976 application could not be processed because he had failed to submit the required documentation. Consequently, he made a

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* One member of the Board must be an officer in the Army Medical Department and senior to the medical officer whose case is being considered. AR 601-25, ¶ 2-22.

new application in April 1976, which was submitted to the Delay and Exemption Board. (A. 17-47). After requesting and obtaining further information from plaintiff (A. 48-51, 82), the Board met on June 4, 1976 and voted 3-0 to deny the application because it failed to meet two of the mandated criteria for exemptions under AR 601-25: specifically, the requirements that the service performed by the applicant "cannot be performed by other physicians residing in the area" and that the applicant "cannot be replaced in the community by another person who can perform the medical . . . service." According to the Board, "Dr. Ornato can be replaced and other persons can perform his services within the terms of AR 601-25, paragraph 2-19a." (A. 53-56).

Plaintiff and his employer, New York Hospital, appealed this decision to the Adjutant General. (A. 80, 57-58). After a review of the file, the Adjutant General denied the appeal because plaintiff's case did not present "such circumstances that the requester cannot be replaced by another person who could perform this service." (A. 59-60). With reference to plaintiff's claimed indispensability, the Adjutant General stated:

> "It is unfortunate that the New York Hospital has experienced difficulty in recruiting for this position due to limited funds and interested applicants, but criteria established by the Army . . . [require] that the service rendered by the applicant cannot be performed by other physicians residing in the area. With the concentration of Cardiologists in New York City and skills necessary to accomplish the several tasks associated with the position described in your letter, your request does not meet this criteria.
>
> . . . The purpose of the Army's community hardship provision in regulations is not to reallocate

the medical resources of the country but to insure that vital health services are not completely disrupted by the removal of an individual who cannot be replaced. While your services performed in this role may be desirable, it is clear that the community will not be denied the benefits of effective emergency medical care upon your departure. Therefore, your appeal has been denied."

The Decision Below

Plaintiff's initial orders had required him to report on July 7, 1976. Because his appeal to the Adjutant General could not be decided before that date, his call-up was delayed until August 5.

On August 4, 1976, one day before his scheduled call-up, plaintiff commenced this action to challenge the Army's denial of his exemption application. In his complaint he alleged that the decision by the Army's Delay and Exemption Board had been arbitrary and irrational, without basis in fact, and in violation of the Army's regulations because it applied improper criteria. (A. 13). As for the Adjutant General's decision on appeal, plaintiff alleged that it had been arbitrary, irrational and without basis in fact. (A. 14). Plaintiff sought declaratory and preliminary and permanent injunctive relief as well as a writ of mandamus to prevent his call-up and to require the Army to discharge him or transfer him to the Standby Reserve on the ground of community need. (A. 15-16).

On August 13, 1976, Judge Goettel heard oral argument on plaintiff's motion for a preliminary injunction and denied the requested relief, holding as follows:

"The motion for preliminary injunction is denied since the plaintiff has failed to make a show-

> ing of probable success on the merits. The jurisdiction of this Court is extremely limited in matters of this nature and purely discretionary decisions may not be reviewed provided that the internal procedures of the Armed Forces have been observed. *Roth* v. *Laird*, 446 F.2d 855 (2d Cir. 1971); *Smith* v. *Resor*, 406 F.2d 141, 145 (2d Cir. 1969); *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1969); *Feliciano* v. *Laird*, 426 F.2d 424, 427 (2d Cir. 1970). A review of the record reveals that the Army complied with its own procedures and regulations." (A. 2).

Judge Goettel continued the temporary restraining order pending expedited appeal, and this appeal followed.

Issue Presented

Did the Army adhere to its regulations governing exemptions of Berry Plan participants (AR 601-25) when it denied plaintiff's application for a community hardship exemption from active service?

Regulation Involved

Army Regulation 601-25, ¶¶ 2-19 to 24

2-19. Delay policy. A USAR MC or DC officer may request a category C delay based on alleged essentiality or community hardship. The provisions of this section do not apply to individuals participating in the US Army Health Professions Scholarship Program.

a. Request for delay for community essentiality or hardship may be approved for a period not to exceed 6 months (rule 22, table 2-1). This delay may be extended for 6 months, or a maximum of a total of one year in accord-

ance with the provisions of paragraph 2-22. Delay will be granted only when all of the following conditions are met:

(1) The medical/dental service being performed is essential to the maintenance of health, safety, or welfare in the officer's community.

(2) The service cannot be performed by other physicians/dentists residing in the area.

(3) Prior to the date scheduled to report for active duty, the officer cannot be replaced in the community by another person who can perform the medical/dental service.

(4) There is reasonable assurance that the officer can be replaced in the community within the authorized period of delay.

b. Physicians and dentists who are not at the time of application performing the health service needed by the community or who have never performed on a regular basis in a community which is alleged to suffer hardship are not eligible for delay or exemption.

2-20. Applying for exemption/delay. a. Request for exemption [or] delay in entry on active duty for essentiality or community hardship will be submitted to CDR, RCPAC as soon as the hardship condition occurs. The application may be submitted in writing by the officer and/or employer and will include as a minimum the following documentary evidence.

(1) A statement from the State Professional Association showing the number of personnel in the area who have similar qualifications, or who are performing the same or similar service.

(2) Letters from at least 5 disinterested persons indicating how the officer's withdrawal from the community

would affect its health, safety, or welfare and the actions taken to obtain a replacement.

(3) The expected date within the authorized 6 months' delay that a replacement will be available to alleviate the hardship condition and a record of the efforts, if any, of attempts by the community to attract alternative medical or dental services.

b. If it is determined that a community hardship exists which may be alleviated within a year, an applicant for exemption may be offered a 6-month delay in lieu of an outright denial. Before the 6-month period expires, the applicant will be required to submit a new application based on existing circumstances in the community at that time.

2-21. Renewal of delay. Request for renewal will be processed the same as for an initial request and will be submitted no later than 30 days before the initial delay will expire. Requests may be approved only when it is determined that the hardship can be alleviated within the renewal period. If renewal is granted, a copy of the approved renewal will be furnished HQDA (SGPE-PDB). If the essentiality can not be alleviated by a temporary delay (normally 1 year), action will be taken to remove the officer from the Ready Reserve. (AR 135-133).

2-22. Board of officers. a. A DA board will be convened at RCPAC to consider applications submitted by or in behalf of MC or DC officers. At least one member of the board will be an officer of the Army Medical Department and senior to the officer whose case is being considered. The board proceedings will be as prescribed by the CG, RCPAC. (The provisions of AR 15-6 do not apply to these proceedings.) Personal appearance before the board of officers is not authorized.

b. The board will recommend approval or disapproval of all requests. Board approval of an application for exemption must include a recommendation for removal from the Ready Reserve (para 3-11). The board may recommend delay in lieu of exemption if in its opinion a disapproved request for exemption warrants delay.

2-23. Board decisions. CG, RCPAC will—

a. Issue appropriate orders when delay or exemption is granted.

b. Disapprove board recommendations only when the disapproval results in action more favorable to the applicant or when the board's findings and recommendations are not supported by any evidence in the record.

c. Insure that final action is taken on board-approved requests for exemption.

d. Inform the applicant of the board's decision and the right to appeal a denied request for delay or exemption (para 2-25).

e. Furnish TSG (HQDA(SGPE-PDB)) copies of orders and communications concerning board decisions.

2-24. Appeal procedures. An applicant requesting delay or exemption will be notified of the reason for denial. The applicant or employer may appeal directly to The Adjutant General (HQDA(DAAG-TCZ-C)), who will make a final decision on the appeal. An appeal must be submitted within 15 days of receipt of the denial letter.

ARGUMENT

The District Court properly refused to issue a preliminary injunction because the Army's denial of plaintiff's exemption request was pursuant to regulation and not otherwise subject to judicial review.

Standards for Judicial Review

Plaintiff requested that the District Court review the United States Army's denial of his application for an exception from active duty service, alleging that the decisions of the Board and of the Adjutant General on appeal were "irrational, arbitrary and without basis in fact" and that the Board had violated the Army's regulations by employing improper criteria. (Complaint, ¶¶ 20, 26). Recognizing that plaintiff's assertion of improper criteria was without merit and that in essence plaintiff sought a court determination of the reasonableness of the Army's denial of his application, the District Court properly denied plaintiff's motion. In doing so, it relied upon the decisions of this and other jurisdictions holding that such discretionary decisions are beyond the scope of judicial review.

The general reluctance of the courts to interfere with internal military matters has often been noted. As the Supreme Court stated in *Orloff* v. *Willoughby*, 345 U.S. 83 (1953):

> "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army be scrupulous not to intervene in judicial matters." *Id.* at 94. *Accord, Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Reflecting this caution, the courts of this and other circuits have recognized that judicial review of personnel decisions by the Armed Forces is "extraordinarily limited." *See, e.g., Feliciano* v. *Laird*, 426 F.2d 424, 427 (2d Cir. 1970); *Kurlan* v. *Callaway*, 381 F. Supp. 594, 596-97 (S.D.N.Y. 1974); *United States ex rel. Lewis* v. *Laird*, 337 F. Supp. 118, 120-21 (N.D. Ill. 1972). As a result, "purely discretionary decisions by military officials which are within their valid jurisdiction will not be reviewed by [the] court." *Smith* v. *Resor*, 406 F.2d 141, 145 (2d Cir. 1969), *citing United States ex rel. Schonbrun* v. *Commanding Officer, Armed Forces*, 403 F.2d 371 (2d Cir. 1968); *Fox* v. *Brown*, 402 F.2d 837 (2d Cir. 1968); *Winters* v. *United States*, 281 F. Supp. 289 (E.D.N.Y.), *aff'd. mem.*, 390 F.2d 879 (2d Cir. 1968).

Applying this standard, the courts have held that determinations of hardship claims by reservists facing active duty are precisely the type of discretionary matters not subject to court review. The reasons for this policy were explained by this Court in *United States ex rel. Schonbrun* v. *Commanding Officer, supra*, 403 F.2d at 374-75, a case involving claims of both community and personal hardship by the reservist:

> "We recognize that . . . official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted. . . . But the necessity for expedition in the military's administration of personnel admittedly subject to its jurisdiction raises a serious question whether the courts should apply this principle with respect to a call-up order. . . .
>
> The very purpose of a 'ready reserve' is that the reserve shall be ready. Under the regulations, delay in exemption from active duty in hardship

> cases is authorized but not required. The hardship must be 'extreme' and while the regulations wisely give more specific content to this criterion, a good deal is necessarily left to the judgment of the commanding officer. . . . [A]dministration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide. . . . Although Schonbrun's case is appealing, . . . the courts must have regard to the flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces. We conclude that this is a subject on which civil review of discretionary actions by the military should be declined. . . ."

This policy was reaffirmed by the Second Circuit in *Roth* v. *Laird*, 446 F.2d 855 (2d Cir. 1971) (per curiam), in which the Court rejected a Berry Plan doctor's request for injunctive relief following the Army's refusal to grant him a community hardship exemption. The Court simply quoted from *Schonbrun* in holding "[T]his is a subject on which civil review of discretionary action by the military should be declined. . . ." *Id.* at 856-57.

Nor is this view of the matter limited to the Second Circuit. Repeatedly the courts have rejected claims by reservists seeking review of the Armed Forces' denial of exemptions from active duty under [illegible] 601-25 on grounds of community hardship. Invariably, the courts have held that such decisions were within the discretion of the Army, even though in some of the cases the courts have suggested that they disagreed with the merits of the

Army's decision. *See Roth* v. *Laird, supra; Appelwick* v. *Hoffman*, No. 76-1564 (8th Cir. Aug. 20, 1976); *United States ex rel. Hutcheson* v. *Hoffman*, 439 F.2d 821 (5th Cir. 1971); *Cunningham* v. *Hoffman*, No. 75-53-NE-CV (M.D. Tenn. Sept. 22, 1976); *Arnold* v. *Rumsfeld*, Docket No. 76 C. 14 10 (E.D.N.Y. Aug. 3, 1976); *Turner* v. *Commander*, Civil Action C 76-198 A (N.D. Ohio June 16, 1976); *Alderman* v. *Schlesinger*, Civil No. 1585-73 (D.D.C. Aug. 21, 1973); *Wishner* v. *Laird*, 1 MLR 2050 (C.D. Cal. Jan. 17, 1973); *Sofranko* v. *Froehlke*, 346 F. Supp. 1380 (W.D. Tex. 1972).*

As the Court in *Roth* pointed out, the only grounds on which courts may generally review a personnel decision taken by the military authorities are "to insure that it is not violative of applicable regulations . . . or to insure that their decision is not so arbitrary and irrational that it cannot stand. . . ." *Id.* at 856. The first ground—adherence to applicable regulations—reflects the fact that "[a]lthough the courts have declined to review the merits of decisions made within the area of discretion delegated to administrative agencies, they have insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved." *Smith* v. *Resor*, *supra*, 406 F.2d at 145. *See, e.g., Hammond* v. *Lenfest*, 398 F.2d 705,

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* The one decision overruling an administrative denial of a community hardship claim by a Berry-plan doctor was recently handed down in *West* v. *Chafee*, 2-74-Civ.-191 (D. Minn. Aug. 11, 1976). In part, the court relied upon the absence of criteria in the Navy's regulations and the failure of the Navy board to provide any reasons for the denial of an exemption. Insofar as the Court asserted a broader standard of review than is customary, its decision appears to have been overruled by the Eighth Circuit in *Appelwick* v. *Hoffman*, *supra*, decided twelve days later.

718 (2d Cir. 1968). Thus, "a federal court may properly examine the decision to call a reservist for active duty in order to determine if the reservist's procedural rights under the applicable statutes and military regulations were violated in a manner which caused substantial prejudice to the reservist." 406 F.2d at 146.

The second ground—that the military action was so arbitrary and irrational as to require reversal—does not permit review of purely discretionary decisions such as those involving hardship claims for exemptions. As this Court made clear in *Schonbrun*, this broad mandamus standard of review based upon abuse of discretion does not apply in the limited situation of a reserve call-up. 403 F.2d at 374-75. *Accord*, *Roth* v. *Laird*, *supra*; *Appelwick* v. *Hoffman*, 76-4047 (D.S.D. June 2, 1976), *aff'd*, No. 76-1564 (8th Cir. Aug. 20, 1976); *Wishner* v. *Laird*, 1 MLR 2050 (C.D. Cal. Jan. 17, 1973). *See also Sofranko* v. *Frohlke*, *supra*, 346 F. Supp. at 1382 (explaining *Roth* v. *Laird*). As these cases demonstrate, the only basis for a review of the denial of a hardship exemption is an alleged failure by the Armed Forces to comply with their own regulations.*

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* Plaintiff seeks to distinguish *Roth* by claiming that in the earlier case the nation's needs were relevant, whereas here the only issue was the community's need. (Brief at 15.) This is untrue. As *Roth and Schonbrun* recognize, national need is necessarily a part of the process of determining whether to require a reservist to report. Plaintiff would not have received an order to active duty unless the Army needed his services. *See* AR 135-50, ¶ 13b(1)(c) (Berry Plan physicians who are excess to Army's needs are not required to fulfill active duty commitment; instead they participate in active reserves or "weekend warrior" program.)

Plaintiff also suggests that AR 601-25 is somehow different from the pre-existing Army Message applied in *Roth*. (Brief at 17.) But the simple fact is that the community hardship criteria are identical and AR 601-25 is no more or less mandatory than the Army Message, which it incorporates. *See, e.g., Turner* v. *Commander*, *supra*, at 3 n.*.

The Army's Decision Complied With Its Regulations

Plaintiff makes no assertion that the Army failed to follow the required procedures in reaching its decision on his application. Moreover, a review of plaintiff's file demonstrates that the applicable regulations were fully complied with, that the Board and the Adjutant General had the benefit of all of plaintiff's submissions, and that they applied the tests set forth in the regulations to plaintiff's case.

To avoid the thrust of the case law excluding judicial review of such discretionary decisions, plaintiff alleges that the Board and the Adjutant General employed improper criteria in reaching their decisions and consequently failed to comply with the governing regulations. This assertion is based upon a tortured reading of two sentences from a summary of the Board's decision and one word used by the Adjutant General in a letter to plaintiff informing him of the final denial of his application. When read in context, it is plain that both decisions were consistent with AR 601-25.

The Adjutant General explained the nature of the interest sought to be protected under the regulation by stating in his letter to plaintiff that its purpose was "to insure that vital health services are not completely disrupted by the removal of an individual who cannot be replaced." Employing this standard, he concluded that New York City has a sufficient number of trained cardiologists to insure that "the community will not be denied the benefits of effective emergency medical care upon [plaintiff's] departure." This is an entirely accurate statement and application of the policy and criteria of the regulation. *See, e.g., United States ex rel. Hutcheson* v. *Hoffman, supra,* 439 F.2d at 823 (regulations directed to such situations "as the loss of a community's only physician").

Plaintiff's quibble as to the Adjutant General's use of the word "could" is entirely beside the point.* The basic question is not whether, on June 4 or July 1, 1976, New York Hospital had available an individual as competent as plaintiff to administer its paramedic program, but whether, if plaintiff departed on a given day, the New York community would have available to it the general type of medical service — *i.e.*, emergency medical care — that plaintiff had helped to provide. This was the question that the Adjutant General was required to and did decide based upon the record before him and his general knowledge of the medical resources available in New York City.

As for plaintiff's assertion that the Board used incorrect criteria, even if this were true—which it is not—it would not save plaintiff's case since the Adjutant General used the correct criteria in his review of the Board's verdict. But in any event, the Board's own decision, while less artfully worded, clearly reflects a proper interpretation of the regulation. Applying the terminology of the regulation, the Board stated that plaintiff "can be replaced and other persons can perform his services. . . ." In essence the Board concluded that there were sufficient cardiologists in New York to staff emergency care pro-

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* Moreover, plaintiff mistakenly attributes to the Adjutant General a statement he never made. The sentence plaintiff quotes at page 21 of his brief is from the summary of the *Board's* proceedings: "Other cardiologists could have been and could be trained to fill Dr. Ornato's positions." (A. 53). Although plaintiff assumes that the Adjutant General made the same statement, in fact the only sentence in his letter that uses the word "could" is the following: "However, it is The Policy of the Army to require that medical service performed by a physician when requesting exemption from active duty based on community hardship, be not only necessary to the health, safety and welfare of its citizens but be under such circumstances that the requester cannot be replaced by another person who could perform this service." (A. 59).

grams, and that even if New York Hospital might be unable to attract a director for its program, this did not mean that the general community would lack sufficient emergency services.

In spite of plaintiff's animadversions, the Board's reference to the "internal traits" of New York is not an improper criterion. The phrase was simply part of the Board's observation that whether or not local hospitals and cardiologists chose to allocate their financial and manpower resources to the type of program run by plaintiff was a matter for them to decide, but that their choice did not reflect a lack of available community medical resources, which is what the regulation is directed to. Under the teaching of *Udall* v. *Tallman*, 380 U.S. 1 (1965) an agency's interpretation of its own regulations, even if not the only one permissible, must be respected "unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 16-17 (quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1949)). Manifestly, the Board's interpretation is neither plainly erroneous nor inconsistent with the regulation, which states as one condition for exemption, that "the service cannot be performed by other physicians . . . residing in the area." *

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* The logic of the Board's interpretation of that requirement is borne out in this case. As plaintiff himself stated in his application to the Board, he earns only his $13,000 annual salary as a Fellow in Cardiology from New York Hospital and is not compensated for his services as head of the paramedic program (A-18). Obviously there is no incentive for the hospital to attempt to find a replacement for plaintiff and no indication in the record that any attempt was ever made, even though plaintiff has known for four years that he would be called to active duty on or about July 1, 1976. Plaintiff's interpretation, reflected in his attacks on both the "internal traits" sentence and the use of the word "could", would in effect permit the hospital to create irreplaceability solely by its own refusal to seek a replacement on reasonable terms. Such bootstrap "indispensability" is not protected by the regulation.

The Army's Decision Was Not Arbitrary or Irrational

Apart from his claim that the Army violated its own regulations, plaintiff asserts that its decision was arbitrary, irrational and without basis in fact, and consequently should be rejected.

In substance, plaintiff's argument is that the Army came to the wrong decision based upon the evidence before it. Such a challenge must be rejected since under the governing case law, the courts will not re-examine the merits of the Army's decision on hardship exemptions, "irrespective of the rubric under which the action is brought." *United States ex rel. Schonbrun* v. *Commanding Officer, supra*, 403 F.2d at 375.

That plaintiff characterizes the decisions of the Board and Adjutant General as arbitrary and irrational is of little consequence in the present context. As this Court has indicated, judicial review will not extend to the merits of the Army's disposition of reservists' hardship claims even if asserted to be "arbitrary" or "irrational". *See id.* at 374. Nor is plaintiff aided by his allegation that the administrative denials of his application were "unsupported by any evidence." That is in effect a restatement of the "basis in fact" standard applicable to conscientious objector cases. *See, e.g., Ferrand* v. *Seamons*, 488 F.2d 1386, 1389 (2d Cir. 1973); *United States ex rel. Donham* v. *Resor*, 436 F.2d 753, 753 (2d Cir. 1971). But this Court has clearly stated that such cases are distinguishable from the hardship exemption situation: "the yea or nea character of entitlement to the conscientious objection exemption" makes the decision far less discretionary than the hardship determination. *United States ex rel. Schonbrun* v. *Commanding Officer,*

supra, 403 F.2d at 374. Since the latter involves "a balancing of the individual's claims against the nation's needs and the balance may differ . . . in a manner beyond the competence of a court to decide," *id.* at 374-75, the review available in conscientious objector cases is not available to the community hardship claimant.

In any event, entirely apart from the limited nature of the review available to plaintiff in this case, the Army's conclusion that the medical care available to New York residents will not be so significantly affected as to come within the intendment of the regulation is neither irrational nor arbitrary.*

With regard to the impact of plaintiff's departure on the availabality of emergency services to the New York community, the Board could reasonably rely on its knowledge of the general availability of emergency care facilities in New York hospitals staffed by trained personnel, including cardiologists, and rapidly accessible by ambulance. It was not constrained—as plaintiff implies—to look solely to the impact of plaintiff's departure on the particular program he administered.

Moreover, even as to that one program, the Board could reasonably have concluded that plaintiff was not irreplaceable. The program had been in existence for three years before plaintiff took it over (A. 38) and hence was unlikely to disappear if he were to leave.** Further-

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* Neither is it without support in the record, although plaintiff's assertion that "[n]o evidence adverse to appellant was ever introduced before the Board" (Brief at 22) in any event misses the mark since the exemption application process is not adversarial in nature.

** That the effectiveness of a particular service available to the community will in some measure be diminished does not dictate a finding of community hardship under AR 601-25. The standard is one of irreplaceability.

more, the specific contributions made by plaintiff would not be lost, even judging from the documentation presented on his behalf. The development of various features of the program, such as special equipment, systems of communication, a corps of trained paramedics, and specific rescue procedures (A. 19-20), are already installed and therefore not dependent upon plaintiff's continued availability. Training of additional paramedics is not solely dependent upon plaintiff's remaining in New York since he is not the only individual in the community actually engaged in their training. (A. 43, 45). As for the knowledge of proper emergency procedures to be followed in dealing with apparent cardiac cases, it is not unreasonable to conclude that the techniques learned by plaintiff could be imparted to one or several cardiologists or cardiology residents at New York Hospital. Moreover, New York City is certainly not without physicians who are knowledgeable about emergency cardiac procedures, and the mere fact that New York Hospital has chosen to rely on plaintiff's uncompenstated services does not establish the non-existence or unavailability to the community of such personnel.

CONCLUSION

Issuance of a preliminary injunction requires a showing of probable success on the merits. Inasmuch as plaintiff failed to make such a showing below, the District Court properly denied his motion for such relief. It is therefore respectfully requested that this Court affirm the order of the District Court.

Respectfully submitted,

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State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 29th day of September, 1976 she served ~~a~~ two copys of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Kunstler & Hyman
370 Lexington Avenue
New York, New York 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian L. Bryant

Sworn to before me this
29th day of September, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632361
Qualified in New York County
Commission Expires March 30, 1978